IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.783 OF 2000

Nasir Dawood Ibrahim Shaikh
@ Sahil Ibrahim Shaikh
aged about 37 years r/at
Flat No.201, 2nd Floor,
Saroopi Godawari, Naya Nagar,
Mira Road, Dist.Thane. ..Appellant.
(at present in Judicial Custody)Org.Accd.No.1.

V/s.

1. Narcotic Control Bureau
   Ballard Estate, Mumbai.

2. The State of Maharashtra. ..Respondents.

Mr.S.B.Keshwani i/b. Shri Pradeep Hingorani, for Appellant.

Mr.Prakash Thakur, Public Prosecutor for Union of India-Respondent No.1.

Mr.Y.S.Shinde, APP for State-Respondent No.2.

CORAM: A.M.KHANWILKAR,J

DATE : OCTOBER 9, 2006.

ORAL JUDGMENT :

1. This appeal takes exception to the Judgment and Order passed by the Special Judge(NDPS) Brihan Mumbai dated October 11, 2000 in NDPS Special Case No.59 of 1998. The appellant was named as accused No.1 alongwith one Ilyas Mohamed Ismail Shaikh and tried for offence punishable under section 29 r/w 21 and 23 and under section 8(c) r/w 21 and 29 and under section 8(c) r/w 23 and 29 of the NDPS Act.

According to the prosecution, one Jamil Khan was also engaged in unlawful activities alongwith the appellant, however, as he was untraceable the trial proceeded only against two accused. The prosecution examined 8 witnesses in support of its case. The accused did not examine any witness in their defence. On analysing the evidence on record, the trial Court proceeded to record finding of guilt only against the appellant/accused No.1 for offence punishable under section 23 r/w 21 of NDPS Act. The trial Court having accepted the prosecution case as against the appellant/accused No.1, proceeded to sentence the appellant to undergo rigorous imprisonment of 10 years and to pay a fine of Rs.One Lakh, in default of payment of fine to undergo simple imprisonment for four months. This decision of the trial Court is the subject matter of challenge in the present appeal. The State has not challenged the finding of acquittal in favour of accused No.2. The limited controversy in the present appeal therefore, is whether the conclusion reached by the trial Court in recording finding of guilt against the appellant/accused No.1 alone can be sustained on facts and in law.

2. The prosecution case is that in the first week of June, 1997 Zonal Director, Narcotic Control

Bureau(N.C.B.), Mumbai received letters dated 23rd May, 1997 from Assistant Commissioner of Police, Anti Drug and Smuggling Unit, Port Louis, Mauritius intimating that they have seized 2 Kgs. and 771.8 grams. of heroin from a consignment exported from India. The consignment was sent in a container in the name of Mahmade Yousouff Soopun consisting of 57 packages, suspected to contain drugs, coming from Mumbai by sea on board vessel "Vishva Nandini" which had arrived at the harbour- Port Louis, Mauritius on 9th April, 1997. The said letter mentions that the consignment was placed under surveillance. On 23rd April, 1997, the said Mr. M.Y.Soopun, after completing the clearance formalities, called at the Associated Containers Service Ltd., at Marine Road, Port Louis to take delivery of the packages. In the presence of Police and the Customs and Excise Officers, Mr.M.Y.Soopun identified the 57 packages as being the consignment destined to him. The said letter also records that whilst verifying the packages, in presence of Mr.M.Y.Soopun, four of them were found to contain a large quantity of heroin powder, concealed in lady’s purses, in between the inner fabrics and the hard covers. It is also mentioned that the said Mr.M.Y.Soopun voluntarily disclosed that the consignment was sent by one Shaikh

Sahil Ibrahim(appellant/accused No.1), a resident of Mira Road, Bombay, having telephone No.8108040. Alongwith the said letter, the Assistant Commissioner of Police, Anti Drug & Smuggling Unit, Mauritius forwarded translated statement of Mr.M.Y.Soopun in English, as also certified copies of Certificate of Origin, the Mennon Chamber of Commerce, Report of the Chief Forensic Science Officer regarding examination of the drug found in the lady's purses, list of movements from Passport & Immigration Office of Shaikh Sahil Ibrahim(appellant/accused No.1) to Mauritius and Soopun and photo-album containing ten photos of the drug and M.Y.Soopun. The said letter appeared to have been duly authenticated by the Consulate, Republic of Mauritius, as well as office of the High Commission of India at Port Louis. Enclosure sent alongwith the said letter however, did not contain signature of any Indian authorities from Mauritius. Acting on the basis of the said information and on receiving intelligence report that accused was available at Mira Road at his residence, Sadashiv Shankar Asawale(P.W.1), Intelligence Officer, N.C.B.,Mumbai visited the place at 8 a.m. He served the copy of the summons on appellant/acused No.1 under section 67 of NDPS Act calling upon him to remain present. Pursuant thereto, the

appellant/accused No.1 appeared in the office of N.C.B.,Mumbai on 15th November, 1997, when his statement came to be recorded by Abdul Jalil Shaikh(P.W.2),Intelligence officer, N.C.B.Mumbai. The said statement dated 15th November, 1997 as recorded is marked as Exh. 24. At the outset, it refers to the fact that the appellant was apprised that he had right to be silent and further, if he made any statement the same may be used against him as well as against any person. It mentions that the appellant after understanding the provisions of section 67 of NDPS Act voluntarily gave statement in question-answer format. The appellant himself wrote down the answer in his own hand writing and put his signature at the places where corrections were carried out and also at the end of every page of the Statement. In this Statement the appellant has stated that he was S.S.C. passed in English medium. After giving brief background about himself he has mentioned that he was engaged in the business of export of imitation jwellary, ladies garments, ladies purses, chappals etc. to Mauritius. He has stated that he was in that business since 1992. He also admitted that he did not have any export licence. He has then stated that initially he used to carry the goods alongwith him as his personal packages, but

started exporting on regular basis from 1995 by cargo through Continental Exports. He has disclosed the modalities, in which purchase orders were received by him. He has stated that he visited traders in Mauritius and collected orders personally or sometime over telephone. He has disclosed the name of the traders of Mauritius with whom he transacted business. Amongst other names he has mentioned the name of M.Y.Soopun. With regard to the procedure for export, he has disclosed that after he purchased material, he did primary packing and handed over those goods to the exporters(Continental Exports), who in turn did secondary packing of the said packets in his presence. He has also stated that as he did not have export licence, all export documents were prepared in the name of Continental Exports, Mumbai and that all invoices, Bill of Lading, Certificate of Origin, Bill of entry are prepared in the name of importers in Mauritius. He has then stated that he had only one importer in Mauritius viz. Mr.M.Y.Soopun, who in turn delivered the goods to the specified traders in Mauritius. Name of the said traders is given by him(appellant). He has also stated that he regularly visited Mauritius on number of occasions for collecting payments. On being shown the list of movements of his visit to Mauritius, the

appellants in his statement has accepted that the details of visit mentioned therein were true and correct. He has also indicated the name of travel agent through whom he used to book the air ticket. In his statement he has also revealed the mode of payment of air fare, as also of the goods purchased from different traders, to be exported. After this statement of appellant was recorded by P.W.2, the appellant was allowed to go home. The appellant was called for further enquiry on next day i.e. 16th November, 1997. Once again the Intelligence Officer(P.W.2) who recorded the statement of appellant under section 67 ensured that the appellant was apprised that he was not liable to make any incriminating statement and had right to be silent. Further, any incriminating statement made by him could be used against him as evidence. Notwithstanding that, the appellant gave voluntary statement as has been recorded by P.W.2, which is marked as Exh. 27. In this statement, he has stated that he had exported last consignment to Mauritius on 21st March, 1997 to Mr.M.Y.Soopun in Mauritius. The goods were exported under Invoice No.CE/104 dated 14th March, 1997. He has spelt out the goods, which were exported under the said invoice as plastic stand, ladies chappals, vollets, shaving kits,

pouches, plastic purses, foam purses, jute bags, religious books, cosmetics and imitation jewellery. The appellant was shown Invoice No.CE/104 dated 14/3/1997 as received duly authenticated by Mauritius Consulate and seal of Police Head Quarters, Port Louis, Mauritius. On perusing the said invoice, the appellant confirmed that the goods in the invoice were exported by him and were his goods exported to M.Y. Soopun in Mauritius. The appellant was then asked to give details from whom he has purchased the articles, which were exported. He has given details of the traders, from whom the articles were purchased. He disclosed that plastic purses (Ladies) were purchased from Plastic Cottage, Chakla Street, Mohd. Ali Road, Mumbai. The appellant was asked whether he would identify the plastic ladies purses exported by him, as shown in photograph. The appellant responded positively. The appellant was accordingly shown the photographs of the ladies purses and the boxes, in which the same were packed, in which contraband item was found in concealed position. The appellant accepted that the said purses were the same which were exported by him to Mauritius. The appellant also acknowledged that the brown powder seen in the photograph is heroine. He has accepted that he was aware that transacting in

the said drug is an offence. He has then stated that the heroine concealed in ladies purses was owned by his friend Jamil Khan. The said Jamil Khan had insisted upon the appellant to conceal the heroine in ladies purses, which were to be exported to Mauritius, for which the appellant would be rewarded by paying sum of Rs.Five Lakhs. The appellant accepted the said offer as he was under heavy debts. The appellant once again stated that he does primary packing of the goods before handing over the same for export to the Continental Exports. He has stated that the ladies purses wherein the heroine was concealed, primary packing and concealment was done by his friend Jamil Khan. Jamil Khan had taken the said purses to one Iliyas(accused No.2) Manager of United Lodge who was the friend of Jamil Khan. Both accused No.2 and Jamil Khan concealed the heroine in the purses and thereafter, delivered those ladies purses to the appellant a week before the shipment, i.e. on 14th March, 1997. The appellant however, has stated that he did not know quantity of Heroine that was concealed in the ladies purses as that was done by Jamil Khan and Iliyas. The appellant has also admitted that earlier to the consignment in question, two times, Jamil Khan and Iliyas had concealed heroine in ladies purses. The appellant

has then disclosed the mode in which he used to receive the payment after export of consignment of heroine to Mauritius. The appellant has also disclosed as to why the Jamil Khan and Iliyas did not go to Mauritius themselves. The appellant has also disclosed that the accused No.2 used to finance for getting heroine. In so far as connection with M.Y.Soopun, he has stated that he knew him since 1995. He met him in Mauritius. The appellant used to export M.Y.Soopun, which he had done 7-8 times in the past. The appellant has also accepted that he had contacted M.Y.Soopun on telephone and assured him that he was sending consignment in March, 1997, which items should be kept by him. The appellant has admitted that he had telephoned M.Y.Soopun twice on 27th April, 1997 for giving instructions about exported goods. The appellant also produced and handed over his passport to P.W.2 and he gave details about Jamil Khan and Iliyas. From the photographs, which were received from Mauritius, when pointed out to the appellant, he identified the photograph of M.Y.Soopun. The appellant has also explained as to why he was signing in two names and two signatures. The appellant has accepted that the statement, which was given by him and written down in his own hand writing was true and correct and was given without

any force, pressure or inducement. From the statement given on 16th November, 1997, as involvement of accused No.1 became amply clear, to connect him with the export of contraband drug in concealed form in ladies purses to M.Y. Soopun, the appellant came to be arrested at 17.00 hours. The appellant was granted police custody. During such custody, the appellant gave one more statement, which has been recorded by P.W.2, Exh. 35 on 19th November, 1997. In this statement, he has given details regarding the mode of purchasing the articles, which were to be exported. He has mentioned that the articles were purchased in cash and without insisting for bill, so as to save sales tax. In this statement, he has mentioned that M.Y. Soopun used to take clearance of exported consignment at Mauritius and give delivery of the goods to the specified traders. This job was done by M.Y. Soopun on getting 10% commission. The other details have been given in the statement such as the consumption of the drugs was for tourist in Mauritius.

3. After investigation was completed, complaint came to be filed before the Special Judge against the appellant/accused No.1 and other accused for offence punishable under N.D.P.S. Act. The accused pleaded

not guilty. The prosecution examined 8 witnesses and produced documentary evidence on record. The documents were received alongwith the letter dated 23rd May, 1997 from the Assistant Commissioner of Police, Mauritius. During the progress of the trial, the N.C.B.,Mumbai Zonal Unit received the set of documents of investigation from High Commission of India, Port Louis, Mauritius duly authenticated through Consulate of the Republic of Mauritius, which consisted of one album containing seven photographs, photocopy of Forensic Report FSL (C) 1332/97, copy of the statement of Mahmade Yousouff Soopun, list from Passport & Immigration office regarding movements of Shaikh Sahil Ibrahim to Mauritius, list from passport & immigration office regarding Y. Soopun to India and copies of Certificate of Origin, invoice, Bill of Entry, Bill of Lading, Delivery receipts from A.C.S., payment receipts. The said documents alongwith original letter dated 16th September, 1999 of the Consulate of Republic of Mauritius was requested to be taken on record and the documents to be read in evidence in the present case. The said application Exh. 53 was filed on 19th November, 1999. The trial Court by order dated 14th December, 1999 allowed the said application directing that the documents referred to in the said application are taken on

record and exhibited. The trial Court negatived the submission of the accused that the said documents were not duly authenticated or that inadmissible in evidence. On merits of the case, the trial Court referring to the oral evidence adduced by the prosecution held that there was sufficient material to indicate complicity of the appellant/accused No.1 in the commission of the offence. The trial Court has essentially found that the appellant was responsible for despatching the goods received by Yousuf Soopun in Mauritius, which contained contraband drugs in concealed form, which in turn was to be delivered to specified traders. The trial Court noted that the fact was clearly established and for that purpose the trial Court has considered evidence of P.W.1 and P.W.2, intelligence officers as well as evidence of P.W.6 and P.W.7 from whom the goods in question were purchased by the appellant, in which subsequently contraband drug was concealed and after doing primary packing thereto came to be handed over to the Continental Exports. The trial Court has also referred to the evidence of P.W.4, who was associated with Continental Exports to hold that his evidence established that the goods in question were received from the appellant with primary packing, to be exported to Yousuf Soopun in Mauritius. On

receipt of the said packets, after following necessary procedure, the same came to be exported in containers by Cargo. The trial Court has also relied upon the evidence of P.W.8 who was the Investigating Officer in the Criminal Case against Yousuf Soopun registered at Mauritius. He has spoken about the form of goods received in Mauritius and disclosure made by Yousuf Soopun that the same were sent in his name from Mumbai by the Appellant. Besides, the trial Court has also relied on the statement of the appellant under section 67 of the Act to record finding of guilt against the appellant.

4. The Judgment of the trial Court has been assailed on behalf of the accused No.1 essentially on the argument that the material relied upon by the trial Court was inadmissible in evidence. The set of documents received from the Assistant Commissioner of Police alongwith his letter dated 23rd May, 1997 were not duly authenticated copies and therefore, inadmissible in evidence. It was then argued that the Chemical Analyser's report relied upon by the prosecution, issued under the signature of Chemical Analyser at Mauritius also was of no avail. In the first place, the same was not duly authenticated. Besides, the same does not indicate the method

adopted for analysing the drugs and the nature of test carried out to reach at the conclusion noted in the report. It was then contended that non-production of contraband drug before the court in the present trial or for that matter the receptacles, in which the same was concealed also having not been produced, the same was fatal to the prosecution case. It is then contended that the statement of appellant/accused No.1 recorded under section 67 of NDPS Act was also of no avail to the prosecution, as the same was retracted and has been obtained under duress and force, which was evident from the material on record. On the above argument, it is contended that this appeal should succeed and the appellant deserves to be acquitted, in any case, entitled to benefit of doubt.

5. The learned Public Prosecutor on the other hand, has supported the reasons and conclusion reached by the trial Court and would argue that there is no infirmity in the ultimate decision of the trial Court.

6. Having considered the rival submissions, the question that arises before this Court is whether the approach of the trial Court in reaching the

conclusion is improper. The trial Court has analysed the oral evidence of the prosecution witnesses extensively. It has also made reference to the documentary evidence on record, which would support the prosecution case and at the end placed reliance on the statement of the appellant/accused No.1 under section 67 of the Act to conclude that the prosecution has established the involvement of the appellant in commission of the crime by producing the evidence beyond reasonable doubt. In my Judgment, I would prefer to analyse the material on record, first taking into account the statement of the appellant/accused No.1 recorded by P.W.2 under section 67 of the Act. According to the appellant, the statement so recorded was obviously not voluntary. The same has been retracted by the appellant at a later point of time. In such a case the accused cannot be convicted solely on the basis of such statement. Besides, there is clinching evidence on record to show that the statement of the appellant was not voluntary.

7. I shall first advert to the established legal position. The Supreme Court in the case of **K.I.Pavunny V/s. Assistant Collector(HQ), Central Excise Collectorate, Cochin, [(1997) 3 Supreme Court**

Cases 721] was dealing with similar contention. The argument before the Apex Court was whether the retracted confession statement is admissible in evidence and could form basis for conviction and whether retracted confessional statement requires corroboration on material particulars from independent evidence. The Apex Court after adverting to series of decisions, in the first place, noted the distinction between the statement made before the police officer and the one made before the customs officer. After noting the said distinction, it has followed the earlier decision of the Supreme Court, taking the view that even though Custom Officers have been invested with many of the powers, which an officer in charge of a police station exercises while investigating a cognizable offence, they do not become police officer within the meaning of Section 25 of the Evidence Act and so the confessional statement made by the accused before the Custom Officer would be admissible against them. Applying the same analogy to the statement made before the intelligence officer (PW-2), by the appellant/accused No.1, under section 67 of the Act, same would be admissible in evidence against the appellant/accused No.1. The Apex Court has noted that statement made under section 67 by a person before his arrest in

connection with the criminal case will be admissible against him, as he is not a person accused within the meaning of section 24 of the Evidence Act at the relevant time. In the present case, it is seen from the evidence that the appellant came to be arrested on 16th November, 1997 at 17.00 hours. Before his arrest, the appellant gave two statements to P.W.2 in his own handwriting. First such statement was given on 15th November, 1997 (Exh. 24); and the second statement was given on 16th November, 1997 Exh. 27 at 11.30 a.m.. It is only on giving those two statements, as the intelligence officer (P.W.2) was convinced about the complicity of the appellant in the commission of the crime, he proceeded to arrest the appellant on 16th November, 1997 at 17.00 hours. Therefore, the statements recorded under section 67(Exh. 24) on 15/11/1997 and (Exh. 27) on 16/11/97 before arrest of the appellant will be admissible in evidence against the appellant. In **K.I.Pavunny's case (Supra)** the Apex Court has observed that the statements would be inadmissible in criminal trial, if it is proved that they were caused by inducement, threat or promise. In other words, merely because the statement has been retracted subsequently, by itself cannot be the basis to discard the same; but it is only when, it is positively found by the court

in the criminal trial that such statement was caused by inducement, threat or promise, the same cannot be used against the accused. The Apex Court has also considered in paragraph-19 of the said decision that such statement can form the sole basis for conviction or not. It is noted that if the statement was found to be voluntary statement given by the accused and is true one, that can form the sole basis of conviction. It will be apposite to reproduce paragraph-20, which has restated the legal position, which reads as under:

> "20. The question then is whether the retracted confessional statement requires corroboration from any other independent evidence. It is seen that the evidence in this case consists of the confessional statement, the recovery panchanama and the testimony of PWs 2,3 and 5. It is true that in a trial and proprio vigore in a criminal trial, courts are required to marshal the evidence. It is the duty of the prosecution to prove the case beyond reasonable doubt. The evidence may consist of direct evidence, confession or circumstantial evidence. In a criminal trial punishable under the provisions of the IPC it is now well-settled legal position that confession can form the sole basis for conviction. If it is retracted, it must first be tested whether confession is voluntary and truthful inculpating the accused in the commission of the crime. Confession is one of the species of admission dealt with under Sections 24 to 30 of the Evidence Act and Section 164 of the Code. It is an admission against the maker of it, unless its admissibility is excluded by some of those provisions. If a confession is proved by unimpeachable evidence and if it is of voluntary nature, it when retracted, is

> entitled to high degree of value as its maker is likely to face the consequences of confession by a statement affecting his life, liberty or property. Burden is on the accused to prove that the statement was obtained by threat, duress or promise like any other person as was held in Bhagwan Singh Vs.State of Punjab (1) (AIR para 30). If it is established from the record or circumstances that the confession is shrouded with suspicious features, then it falls in the realm of doubt. The burden of proof on the accused is not as high as on the prosecution. If the accused is able to prove the facts creating reasonable doubt that the confession was not voluntary or it was obtained by threat, coercion or inducement etc., the burden would be on the prosecution to prove that the confession was made by the accused voluntarily. If the court believes that the confession was voluntary and believes it to be true, then there is no legal bar on the court for ordering conviction. However, the rule of prudence and practice does require that the court seeks corroboration of the retracted confession from other evidence. The confession must be one inculpating the accused in the crime. It is not necessary that each fact or circumstances contained in the confession is separately or independently corroborated. It is enough if it receives general corroboration. The burden is not as high as in the case of an approver or an accomplice in which case corroboration is required on material particulars of the prosecution case. Each case would, therefore, require to be examined in the light of the facts and circumstances in which the confession came to be made and whether or not it was voluntary and true. These require to be tested in the light of a given set of facts. The high degree of proof and probative value is insisted in capital offences."

In other words, the only argument available to the appellant, which requires to be considered is:

whether the statements Exh. 24 and 27 can be labelled as product of inducement, threat or promise. Looking at the statements(Exh.24 and 27) as it is, there is nothing to establish the grievance of the appellant that the same were caused by inducement, threat or promise. On the other hand, there is intrinsic evidence to suggest that the appellant voluntarily gave his statement, which is truthful one. At the outset, the appellant was apprised that he was not obliged to give the statement and he had right to remain silent and he was also apprised that the statement can be used against the appellant in the criminal case. Nevertheless, the appellant proceeded to give the statements. The officer asked questions to the appellant to which the appellant has given reply, which were within his personal knowledge. The appellant has written down the reply in his own handwriting. Wherever there was some error and correction carried out, the appellant has put his signature. The appellant has put his signature as well as date on every page of the statement. The appellant has put two different signatures in two different names, which also has been explained by him. At the end of the statement, the appellant has reiterated that he was giving truthful answers in his own hand writing without any

force, pressure and inducement. In the two statements(Exh. 24 and 27) the appellant has admitted his involvement in purchasing goods, which were to be exported. After purchasing the articles, contraband drug heroine was concealed in the ladies purses and thereafter primary packing was done by him. The packets were then made over to Continental Exports, who in turn did secondary packing in his presence. The articles were sent in containers to Mauritius, to be delivered to M.Y. Soopun at the instance of the appellant. These facts are truthful version given by the appellant, which were within his personal knowledge. The fact that the appellant later on retracted his statement would be of no avail. As mentioned earlier statement Exh. 24 was recorded on 15th November, 1997, Exh. 27 was recorded on 19th November, 1997 and Exh. 35 was recorded on 19th November, 1997, whereas the retraction was done by the appellant not immediately on producing before the Magistrate for remand, but subsequently on 28th November, 1997, which is obviously on legal advise. To consider the argument that the statement Exh. 24 and 27 recorded by P.W.2 were invalid statements being outcome of threat, inducement or promise, it would be appropriate to now advert to the evidence of P.W.2. P.W.2 in his

evidence has clearly stated the manner in which the accused gave statement and how the same was recorded in the hand writing of the accused himself. He has stated that he was satisfied with the statement given by the accused/appellant was his voluntary statement. This witness has also spoken about the fact that the appellant identified the invoice No.CE/104 dated 14th March,1997 under which goods were sent to Mauritius. He also identified the photograph of Yousuf Soopun, as also identified the boxes and ladies purses from the photographs shown to him during recording of statement. In the cross-examination suggestion has been given to P.W.2 that before he had interrogated the accused No.1/appellant, he was aware that he had exported the goods through Continental Exports. He has stated that the appellant was connected with Continental Exports since he exported goods through them. This witness has accepted that he did not visit the premises of export company before issuing summons to appellant/accused No.1. He has however, explained that priority of issuing summons to accused No.1 was given as his name figured in the communication received from the Assistant Commissioner of Police, Mauritius, on the basis of disclosure made by M.Y.Soopun in Mauritius. Much emphasis was placed on the answers given by P.W.2 as

noted in paragraph-23 onwards to buttress the argument that the statements Exh. 24 and 27 were involuntary and caused by inducement, threat or promise. P.W.2 was asked whether after service of summons he had asked the accused about his willingness to give statement. P.W.2 stated that he did not remember, if he had asked the appellant about his willingness to give his statement. The witness however, has categorically stated that the appellant was not under any pressure when he(PW-2) had interrogated the accused. He has stated that whatever was asked to appellant, has been recorded in Exh. 24. In paragraph-25 of the cross-examination, P.W.2 has stated that he knew at the time of recording of statement of accused No.1/appellant that he could read and write English. Much emphasis was placed on the answers given by P.W.2, that "first paragraph" of statement Exh.24 was written by him on behalf of the accused. However, that does not mean that the answers given by the accused were caused by inducement, threat or promise. That question would only discredit P.W.2 to the limited extent that the entire statement was not written by accused No.1/appellant himself as stated by him. But the writing of first paragraph was attributable to the P.W.2. The fact remains that the appellant has

signed at the end of the first paragraph and put his signature and date. In paragraph-26 of the cross-examination, P.W.2 has stated that the accused No.1/appellant had signed on Exh. 23 as per his guidance. From the answer in paragraph-27, it was argued that the only inference that can be drawn is that the appellant accused No.1 was made to write in his own hand writing from a prepared statement. This argument was on the basis of the answer given in paragraph-27 of the cross-examination that the witness P.W.2 had gone through the statement Exh. 24 after it was recorded. He has then mentioned that he had gone through Exh. 24 before recording the statement of appellant Exh.24. This version seems to be confused answer given by P.W.2- but by no standard, it can be said that Exh. 24, the statement was prepared statement and the accused was forced to sign the same. Interestingly, no such grievance is made by the appellant in the formal retraction application filed before the lower Court on 28th November, 1997. In that application, all that is mentioned by the appellant, is that, the officer of NCB had assaulted and forced him to write as spoken, dictated by him. The contents of which he had never said before them. It is then asserted that all statements have been dictated to him under force,

threat, coercion and the statements were neither free or voluntary and cannot be used against him. No grievance was made in this application that the statement attributed to the appellant/accused No.1 as written down in his handwriting was on the basis of prepared statement. The grievance in the retraction application however, was that the appellant was assaulted and forced to write the statement. There is no evidence on record to support the claim of the appellant that he was assaulted by the officers. Moreover, it is common ground that after recording of statement Exh. 24 on 15th November, 1997, the appellant/accused No.1 was allowed to go home. Surely then, the appellant would have lodged complaint or discussed about the case of assault and forced writing to the appropriate authority or his close friends and relatives. No such evidence is forthcoming. In paragraph-29 of the cross-examination, P.W.2 has been asked whether he put questions regarding drugs to accused No.1 in Exh.24. He has accepted that question was not put. The fact that no question regarding drug was put to the appellant/accused No.1 in Exh.24(first statement), goes to show that P.W.2 intelligence officer had adopted some strategy to make the accused comfortable, so that he would disclose the true and

correct fact later. P.W.2 has also stated in paragraph 29 that accused was allowed to go home on 15th November, 2006 after recording of statement Exh.24 and no vigilance was kept on his movements. The fact remains that on the next day i.e. on 16th November, 1997, the appellant/accused No.1 once again appeared before the intelligence officer when his further statement Exh.27 came to be recorded. In this statement, incriminating material has come on record. I have extensively referred to the contents of Exh. 24 and 27 in the earlier part of this Judgment. What is interesting to note is that there is not even a suggestion to P.W.2 that he was dictating answers to the appellant/accused No.1, which the appellant reduced into writing in his own handwriting. In paragraph-29, P.W.2 has been asked whether the accused No.1/appellant was not allowed to go home after Exh.24 and was man-handled and ill-treated during the night intervening 15th and 16th November, 1997, which suggestion has been denied. In the earlier part of paragraph-29, however, case put to this witness at the instance of appellant/accused No.1 was that after completion of statement Exh.24, accused was allowed to go and no vigilance was kept on his movements. These two pleas are diagonally opposite to each other.

Interestingly, no case has been put to P.W.2 with regard to the statements-Exh.27 and Exh.35, except general suggestions that the statements were not of accused No.1. Suffice it to observe that on analysing the statements Exh. 24, 27 and 35 at their face value, coupled with the oral evidence of P.W.2 who has caused to record said statements of appellant/accused No.1, it is not possible to countenance the argument that the same were obtained by inducement, threat or promise. The evidence on the other hand, clearly goes to show that the statements of appellant/accused No.1 were voluntary and truthful. The prosecution has proved by unimpeachable evidence that the statement of appellant/accused No.1 were of voluntary nature. On this finding and in view of the settled legal position, it is open to the court to record conviction against the appellant/accused No.1 on the sole basis of these statements, which clearly indicate the complicity of the appellant/accused No.1 in the commission of offence in question.

8. However, as observed by the Apex Court in the case of **K.I.Pavunny,** as a rule of prudence and practice, the Court would seek general corroboration of the retracted confession from other evidence. The

Supreme Court has observed that it is not necessary that each fact or circumstance contained in confession is separately or independently corroborated. It is enough, if it receives general corroboration. The burden is not as high as in the case of an approver or an accomplice, in which case corroboration is required on material particulars of the prosecution case. There is another recent decision of the Supreme Court in the case of **Ravindra Singh alias Bittu V/s. State of Maharashtra(2003 SCC (Cri.) 1062.** The Apex Court after considering series of decisions has noted that confessional statement is a substantive piece of evidence and if it is voluntary and truthful, does not require corroboration. The confessional statement of the accused can be relied upon for the purpose of conviction and no further corroboration is necessary, if it relates to accused himself. It is further observed that there can be no doubt that free and voluntary confession deserves the highest credit. It is presumed to flow from the highest sense of guilt. It is also observed in this decision that once confessional statement of the accused is accepted, it would be sufficient if there is general corroboration of the important incidents and not that the corroborative evidence itself should be sufficient

for conviction. This test will have to be borne in mind while considering the prosecution case against the appellant/accused No.1. I have already analysed the statements Exh.24 and 27 in particular, which were recorded by P.W.2 before arrest of the appellant/accused No.1. In the light of the said confession, general corroboration of important incidents will have to be looked for; such as the appellant/accused No.1 purchased articles locally, especially ladies purses and then of concealing of heroin in the cavity of the said purses and also of doing primary packing of the said articles, which in turn were made over to the Continental Exports and secondary packing thereof was done in his presence, before the same were despatched in containers to Mauritius, to be received by M.Y. Soopun. The fact that the appellant/accused No.1 was frequently visiting Mauritius for such business deals is corroborated from the movements list and passport of the appellant/accused No.1, which has been accepted by him.

9. Counsel for the appellant, however, placed reliance on the decision of the Division Bench of our High Court in the case of **John Ohuma Ogmekwe & Anr. V/s. Intelligence Officer, NCB, Bombay & Anr.**

(1998(2) LJ 553). From the discussion in paragraph-14 and 16 of this decision, it is seen that the High Court doubted the statements as being involuntary in nature, on account of intrinsic evidence to that effect. It was noticed by the Court that two different confessional statements of two accused recorded simultaneously were verbatim. Besides, the prosecution evidence suggested that the statement was given by the accused in narrative form, but the statement proved in evidence were in question-answer form. In other words, the statement of the accused under section 67 came to be discarded in the fact situation of that case. In paragraph-17, what is the relevant to note for our purpose, is the statement of law. In paragraph-17, it is mentioned that statements under section 67 of NDPS Act are used as confessional statements and only on that basis a conviction can be recorded/sustained. Reliance was then placed by the counsel for the appellant on the decision of the Supreme Court in the case of **Parmananda Pegu V/s. State of Assam [(2004) 7 SCC 779].** That decision deals with the efficacy of retracted confession. However, in that case, the Court was dealing with confession made before the Judicial Magistrate in terms of provisions of section 156 of Code of Criminal Procedure. There can be no

difficulty as to in what circumstances truthfulness of the confession can be doubted. That however, would depend on the fact of each case. In the present case, I have already analysed the statements as well as oral evidence of P.W.2 and formed the view that the statements of appellant/accused No.1 recorded under section 67 of NDPS Act were voluntary and truthful ones.

10. Besides the statements of appellant/accused No.1 under section 67 of NDPS Act, Prosecution has brought on record oral and documentary evidence to support the prosecution case that the appellant/accused No.1 was responsible for export of the articles in question, in which heroine was found concealed in the cavity. There is evidence of P.W.7 and P.W.6 who have spoken about the fact that the appellant/accused No.1 purchased the articles in question from them. The articles (Ladies purses) which have been traced in the consignment received by M.Y.Soopun at Mauritius were the same articles as identified from the photographs shown to them. The prosecution has also examined P.W.4, who was attached to Continental Exports. He has deposed that the appellant/accused No.1 had brought articles, to be exported to Mauritius. The primary packing of the

said articles was already done by the appellant/accused No.1 himself. In presence of appellant/accused No.1 secondary packing of the said packets was done and packed in boxes and sent by the containers. This witness has also spoken about the relevant documents prepared by him for forwarding the articles to the consignee M.Y Soopun to Mauritius. Continental Export had to undertake that job as the appellant/accused No.1 did not possess export licence. This witness has also spoken about the fact that the appellant/accused No.1 used to export goods through continental exports to Mauritius, even in the past. Indeed, the original documents have not been brought on record by the prosecution. Prosecution has however, brought on record the documents received from the Consulate of Republic of Mauritius duly authenticated, which have been taken on record in terms of order dated 14th December, 1999, and exhibited. The documents, which have been exhibited in terms of order passed on 14th December, 1999, on application Exh. 53, are album containing seven photographs, photo copy of forensic report-FSL(C) 1332/97, copy of the statement of Mahmade Yousouff Soopun, list of movements from Passport & Immigration office regarding movements of Shaik Sahil Ibrahim to Mauritius and list of movements from Passport and

Immigration office regarding movements of M.Y.Soopun to India and copies of certificate of origin, invoices, Bill of Entry, Bill of lading, delivery receipts from ACS, payment receipts. These documents establish the position that the goods in question were received at Port Luise, Mauritius in the same form, in which they were exported through Continental Exports. The said consignment was intended to be sent to M.Y. Soopun. The prosecution has also examined P.W.8, the Investigating Officer in the Criminal case instituted against M.Y.Soopun in Mauritius. He has spoken about the procedure followed after keeping surveillance on the goods received from Mumbai. He has also spoken about the fact that the said boxes were opened in the presence of M.Y. Soopun and contraband item heroine was recovered from the cavity in the ladies purses, which was kept in concealed position. His evidence also indicates that the said drug tested positive for heroine. The Chemical Analyser's report, Mauritius discloses the contents of percentage of contraband heroine. The prosecution has also examined P.W.1, 2 and 5, who have deposed about the receipt of letter from Assistant Commissioner of Police, Mauritius dated 23rd May, 1997 and the steps taken by the Intelligence Officer on the basis of such intimation.

The letter clearly refers to the involvement of appellant/accused No.1. The evidence produced by the prosecution has been rightly found to be trustworthy by the trial Court. The trial Court on the basis of proper appreciation of oral and documentary evidence proceeded to hold that the appellant/accused No.1 was instrumental for the export of the goods in question in the form received in Mauritius in the name of M.Y.Soopun. The trial Court has also adverted to the fact that although the said M.Y. Soopun was initially convicted by intermediary Court in Mauritius, but later on, has been acquitted by the Supreme Court on the reasoning that there was no evidence to indicate that M.Y.Soopun had knowledge about the contents of contraband item kept in the ladies purses in concealed manner. On that reasoning the Supreme Court of Mauritius gave benefit of doubt to M.Y.Soopun. The Supreme Court of Mauritius has not doubted the position that the contraband item placed in the ladies purses was heroine. The fact that the goods exported from Mumbai contained heroine has been accepted in the Criminal proceedings against M.Y. Soopun in the Court at Mauritius. That fact is established from the forensic report. Taking the totality of the evidence into account, the trial Court, in my opinion, has justly convicted the

appellant/accused No.1 for offence punishable under section 23 r/w 21 of the N.D.P.S.Act.

11. To get over this position, counsel for the appellant would contend that the material relied upon by the trial Court was inadmissible. It was contended that the documents received from Consulate of Republic of Mauritius were inadmissible. The same were not duly authenticated. In any case, there can be no presumption about the truth of the contents of those documents. Reliance was placed on section 66 of N.D.P.S. Act to buttress this submission. Section 66 of the N.D.P.S.Act reads thus:

> "66.Presumption as to documents in certain cases.- Where any document -
>
> (i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law, or
>
> (ii) has been received from any place outside India (duly authenticated by such authority or person and in such manner as may be prescribed by the Central Government) in the course of investigation of any offence under this Act alleged to have been committed by a person,
>
> and such document is tendered in any prosecution under this Act in evidence against him, or against him and any other person who is tried jointly with him, the court shall-
>
> (a) presume, unless the contrary is proved, that the signature and every other

> part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting; and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;
>
> (b) admit the documents in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence;
>
> (c) in a case falling under clause (i), also presume, unless the contrary is proved the truth of the contents of such document."

On plain reading of this section, if a document is produced by any person under the Act (N.D.P.S. in this case), which was received from any place outside India duly authenticated by authority or person in the manner prescribed by the Central Government, received in the course of investigation of the offence, which is alleged to have been committed by the accused, the Court shall presume, unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting; and in the case of a document executed or attested, that it was executed or attested by the person by whom it

purports to have been so executed or attested; do admit such document in evidence if the same is otherwise admissible in evidence. In the present case, each of the documents were received in the course of investigation of the case from the Consulate of Republic of Mauritius alongwith letter dated 16th September, 1999, were duly authenticated. Accordingly, the trial Court by order dated 14th December, 1999 took the said documents on record. The argument however, is that, the presumption with regard to the documents falling under clause (ii) of section 66 is not in respect of the truth of the contents of such documents. The argument seems to be attractive, however, overlooks the evidence which has come on record. P.W.8 who was the investigating officer in the criminal case at Mauritius. He has been examined, who has referred to the relevant contents of the said documents. In the present case, as the statement of accused under section 67 has been accepted as trustworthy, the Court will look at the material only to receive general corroboration of the retracted confession as a rule of prudence. Suffice it to observe that the quality of evidence, which has been brought on record by the prosecution leaves no manner of doubt that the fact conceded by the appellant/accused No.1 in his statement under section

67 of the N.D.P.S.Act receives general corroboration from the other evidence. Some infirmity, assuming if any, in the procedure, will not be fatal to the prosecution case in the fact situation of the present case.

12. Counsel for the appellant had vehemently argued that the prosecution has failed to establish that what was seized in Mauritius was a contraband item. This is so because the chemical analyser's report is not duly authenticated. Besides, the Chemical Analyser has not been examined and for which reason contents of the chemical analyser report have not been proved in evidence. Moreover, even if the said report was to be accepted in evidence, the same was of no avail; because it had failed to indicate the method adopted by the experts in analysing items sent for analysis and the nature of test carried out for reaching the conclusion that it was a contraband item. Once again this argument overlooks that the relevant documents including the Chemical Analyser's report prepared at Mauritius has been brought on record. The same has been exhibited. Indeed, the exhibition of documents does not mean that the contents thereof are proved. However, in the present case the prosecution witnesses in particular, P.W.8

has spoken about the opinion recorded by the forensic expert that the item seized was contraband item. In fact, the accused (M.Y.Soopun) before Mauritius Court was tried and the Court in Mauritius have found as of fact, while accepting the said report that item seized from the consignment exported in the name of M.Y.Soopun was contraband items. However, the Supreme Court of Mauritius gave benefit of doubt to M.Y. Soopun on the reasoning that the prosecution failed to establish that the accused had knowledge about the contents of the goods received in his name. The Judgment of the Mauritius Court has also been brought on record. As is mentioned earlier, once the statement of appellant/accused under section 67 of N.D.P.S. Act is accepted as voluntary and truthful one, it is enough for the prosecution to produce on record material, which receives general corroboration of the confessional statements Exh.24 and 27.

13. Counsel for the appellant had relied on the decision of the Division Bench of our High Court in the case of **Mainuddin Kasim Mulla V/s. The State of Maharashtra(1991 Cri.L.J.1699)**, particularly observations in paragraph-9 of the said decision. In that case, the Sessions Court had found that the prosecution evidence was enough to hold that the

accused was guilty of the offences for possession of drugs. Our High Court on analysing the evidence in that case found that the sample articles, which were sent to the chemical analyser were never secured back by the concerned officials and were never produced before the Court. This Court further went on to observe that in order to establish clearcut link between seized articles and the report of the chemical analyser, it was absolutely necessary to have identified before the Court, as a substantive piece of evidence, the packets in which the samples were collected and were sent to the chemical analyser. The observations of this Court were in the fact situation of that case. In the present case, however, it has come on record that the appellant has admitted that he had exported heroine in concealed manner. The goods so exported and later on seized in Mauritius were destroyed as per the requirement of law of that country. The articles(goods/samples) were available before the Court in Mauritius during the trial of the Criminal case against M.Y.Soopun. There is no reason to doubt the correctness of the version given by P.W.8 in this regard. As is mentioned earlier, in the present case, the matter will have to be considered in the light of the statement given by the appellant/accused No.1 under

section 67 of the Act, which has been found to be voluntary and truthful one. Suffice it to observe that the decision pressed into service by the appellant will be of no avail.

14. Counsel for the appellant also relied on an unreported decision of the Single Judge of this Court in Criminal Appeal No.493 of 2000 dated 6th May, 2005. In the said decision, this Court has found that the contents of the chemical analyser's report were vague and did not specifically mention as to how the chemical analyser arrived at the said conclusion, so as to discard chemical analyser's report. I have already analysed this aspect in the earlier part of the Judgment. The chemical analyser's report is dated 5th May, 1997, which mentions that four sealed envelops were received in the laboratory. Each envelop was found to contain one blue plastic bag with plastic sachets each wrapping brownish powder. The details of the contents in the envelops are given in this report. The report then mentions that chemical analysis revealed the significant presence of Heroin (Diacetyl Morphine) from each sample of powder. It notes that the analytical findings are consistent with the products being classified as illicit heroin. The percentage of purity for Heroin,

as determined by Gas Chromatography has been mentioned. From this report it is obvious that necessary details and information has been furnished on which basis the conclusion has been reached. Moreover, as rightly argued by the learned APP, prior to 2001 even in India, the test or analysis to be undertaken by the expert was only a qualitative test. From 2001 onwards the procedure of analysis has undergone change. The present sample has been analysed in May, 1997. In any case, basic information on the basis of which the conclusion that the product was Heroin, is spelt out from the report. In any case, the evidence on record will have to be analysed in the context of the statement under section 67 of the N.D.P.S.Act to find out whether the same receives general corroboration. As free and voluntary confessional statement is a substantive piece of evidence, which deserves highest credit, the same requires no corroboration.

15. Counsel for the appellant had placed reliance on the decision of the Supreme Court in the case of **Jitendra & Anr. V/s. State of M.P.(2003(4) Crimes 225(SC)** to contend that it was obligatory for the prosecution to examine independent witness as to the recovery of the drugs and on other matters. However,

the prosecution in the present case has produced only interested testimony of police officers. Even this decision is of no avail to the appellant. In the present case, the prosecution is not only relying on the confessional statement of appellant/accused No.1 but the circumstances stated in the confessional statement, which have received general corroboration from the other evidence, such as the duly authenticated documents received from the High Commission, including the evidence of P.W. 6 and 7 who had sold goods in question to the appellant/accused No.1 and the evidence of P.W.4, who has deposed about the fact that the goods were brought to Continental Exports by the appellant. The primary packing of the goods was done by the appellant himself when the goods were brought in Continental Exports. Besides, the secondary packing was done in the presence of appellant/accused No.1 by Continental Exports and the packets, which were received in Mauritius were in the same form. All these material leave no manner of doubt about complicity of the appellant/accused No.2 in the commission of the crime.

16. The counsel for the appellant had also contended that non-production of receptacles before

the Court, in which the contraband item was concealed (ladies hand purses) was fatal to the prosecution case. Even this submission does not commend to me. There is other evidence on record, which generally corroborates the retracted confessional statement. As observed by the Apex Court in **Pavunny's case(Supra)**, it is not necessary that each content in confessional statement should be independently corroborated.

17. It was submitted before this Court that the Investigating Officer has falsely implicated the appellant/accused No.1. He made no effort to make any enquiry against the Continental Exports, who had despatched the consignment under their documents. Moreover, whatever version has been recorded in the statement under section 67 of the Act, purportedly at the instance of the appellant, was already known to the Investigating Officer at the relevant time. Evidence indicates that the Investigating Officer contacted Continental Exports for the first time in February, 1998. These circumstances by itself cannot be the basis to doubt that the statements of appellant/accused No.1 recorded under section 67 of the Act, being involuntary. Indeed, the Investigating Officer has not offered any explanation

as to what steps were taken between June, 1997 and November, 1997, even though the letter from Assistant Commissioner of Police, Mauritius dated 23rd May, 1997 received in June, 1997. The Investigating Officer has merely mentioned in his evidence that on intelligence report about availability of appellant/accused No.1 at his residence at Mira Road, summons was served on appellant on 14th November, 1997. There is no clear statement as to why the summons could not be served in earlier point of time or whether inspite of efforts the accused could not be traced between June, 1997 till 14th November, 1997. Even so, this infirmity cannot be the basis to undermine the efficacy of the confessional statement given by the appellant/accused No.1 under section 67 of the Act, that being found to be voluntary and truthful and the other evidence is enough to receive general corroboration of the said statements. I have no hesitation in upholding the finding of guilt recorded by the trial Court on the above reasons. The trial Court has more or less given the same reasons, but in different order.

18. While parting, it needs to be mentioned that although several contentions were raised before the trial Court, the argument before this Court was

confined to the points, which have been elaborately considered in this Judgment. The appeal is therefore, devoid of merits. The same should fail.

19. Accordingly, the appeal is dismissed.